

this Court for leave to file the accompanying brief as *amicus curiae*.

I am a public policy analyst specializing in the study of federal antitrust settlements. I am currently a senior fellow at the Center for the Advancement of Capitalism in Arlington, Virginia, and president of Citizens for Voluntary Trade, a nonprofit association located in the District of Columbia. In the past year, I have filed extensive public comments on behalf of both organizations in response to antitrust consent orders negotiated by the Department of Justice and the Federal Trade Commission.

Of particular interest to my work is the impact of antitrust laws on the rights of physicians and other health care providers. In the FTC's consent orders with five separate physician groups last year, I provided the only extended and substantial public comments on the settlements. As such, I am in a unique position to present this Court with insight into the case at bar.

The proposed brief presents information that will hopefully assist the Court in determining whether the Proposed Final Judgment filed in this case on December 13, 2002, satisfies the public interest requirements of the Tunney Act. It is not the goal of this brief to comment on the particulars of the settlement, but on the lack of necessary information necessary to properly make a public interest determination. I expect to separately file substantial public comments discussing the entire case prior to the expiration of the comment period.

For these reasons, I request leave to file the accompanying brief as *amicus curiae*.

Dated: February 15, 2003.

Respectfully Submitted,

S.M. Oliva,
2000 F Street, NW, #315, Washington, DC
20006-4217, Tel: (202) 223-0071, E-mail:
voluntarytrade@aol.com. *Amicus Curiae*

Brief of S.M. Oliva, as *Amicus Curiae*

Statement of Interest

I, S.M. Oliva, declare that I have no financial interest in this case, nor do I have a financial interest in any competitor of Mountain Health Care, P.A. The views expressed in this brief are my own, and are based on my experience as a public policy analyst in the field of antitrust and competition law.

Summary

In reviewing the Proposed Final Judgment before the Court in this case, *amicus* offers two arguments:

- The United States failed to disclose material facts in their complaint and Competitive Impact Statement (CIS).

- The United States provided insufficient information in the CIS regarding the status and role of Mountain Health Care in the relevant marketplace, as well as how Mountain's acts directly impacted competition in those markets.

A major purpose of the Tunney Act¹ is to facilitate public comments which may assist the Court in determining whether a proposed consent decree is in the public interest. The CIS, in part, is supposed to provide the public with an adequate description of the "practices or events" giving rise to an alleged antitrust violation, as well as disclosure of any "determinative materials or documents" considered by the government in preparing the proposed Final Judgment.

In this case, the CIS failed both of these tests. The United States took substantial shortcuts in complying with the Tunney Act, and in the process failed to fulfill Congress's underlying objectives. This Court, however, possesses broad statutory power to remedy this situation, by directing the United States to file a revised CIS that provides the public—and the Court—with adequate information to decide whether the proposed decree is in the public interest.

Failure To Disclose Material Facts

In the complaint, the United States asserts that Mountain "organized and directed an effort to develop a uniform fee schedule to be used to negotiate and contract for fees for physician reimbursement"² from a number of managed care companies and other third-party benefit providers. This fee schedule, according to the government, "unreasonably restrained competition" in violation of section 1 of the Sherman Act.³ As a result, the United States filed suit to obtain the dissolution of Mountain "before further inquiry to consumers in North Carolina or elsewhere occurs."⁴

This "uniform fee schedule" is the nexus of the complaint and the resulting proposed Final Judgment. So long as Mountain maintains this schedule, consumers remain in danger under the Sherman Act. The only way to get rid of the schedule, in the government's view, is for Mountain to be denied its very existence. Otherwise, this fee schedule will continue to run amok,

spreading its anti-competitive effects throughout western North Carolina.

But the problem is, the fee schedule the government speaks of may no longer be in play. According to statements made to *amicus* by Ellen Wells, Mountain's president and chief executive, Mountain's current "fee schedule" is nothing more than individual doctors informing an independent consultant about their general pricing terms. In other words, a third party spoke to Mountain's physicians separately, obtained independent fee requests, and passed that information along to the managed care companies and other payors. At no point, according to Wells, was there an agreement or conspiracy among Mountain physicians to create a "universal" schedule of fixed fees.⁵

Not only does this system not violate the Sherman Act, the United States expressly endorses this type of "messenger model" as a safe haven from the general prohibition on independent physicians collectively bargaining with payors. According to the 1996 revisions to the Department of Justice-Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care:

Some networks that are not substantially integrated use a variety of "messenger model" arrangements to facilitate contracting between providers and payers and avoid price-fixing agreements among competing network providers. Arrangements that are designed simply to minimize the costs associated with the contracting process, and that do not result in a collective determination by the competing network providers on prices or price-related terms, are not per se illegal price fixing.

If Mountain's claim, then, is true, and they were employing (or transitioning to) a messenger model, there is no need for the government's proposed remedy—dissolution of Mountain—because there is no illegal behavior taking place. Yet nowhere in the complaint or CIS does the United States discuss, or even acknowledge, Mountain's claim that they employed a messenger model. The government doesn't even offer evidence to refute the claim. Instead, the complaint and CIS present a carefully edited, limited recitation of the facts, omitting a key detail that might influence the public's analysis of the case. In the absence of these disclosures, the public is left to incorrectly conclude that Mountain was simply an illegal price-fixing arrangement among physicians, and that

¹ 15 U.S.C. § 16(b)–(h).

² Compl. ¶ 1.

³ *Id.*

⁴ *Id.*

⁵ Telephone interview with Ellen Wells, President of Mountain Health Care, P.A. (Jan. 23, 2003).